

October 20, 2014

Ms. Karen Jernigan
Councilmember City of King
206 N. Mildred Avenue
King City, CA 93930

Re: Your Request for Advice
Our File No. A-14-173

Dear Ms. Jernigan:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code Section 1090. As explained below, although we normally would also provide advice on the application of the Political Reform Act's¹ (the "Act") separate conflict of interest provisions, Section 1090 is more restrictive than the Act in this situation and we therefore focus our analysis on those provisions. Please note that we do not provide advice on any other conflict of interest restrictions, if applicable, outside the Act or Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

In regards to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Monterey County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding brought against any individual other than the requestor." (See Section 1097.1(c)(5).)

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

QUESTION

Does Section 1090 prohibit the City from making contracts to purchase goods or services from King City Glass?

CONCLUSION

Section 1090 would prohibit the City from making contracts with King City Glass for the purchase of goods or services except, as explained below, when the contract is for repairs reasonably related to the replacement or repair of glass on city buildings or facilities that are immediately necessary to prevent vandalism or theft. In the limited circumstances where the City would be permitted to contract with King City Glass, you would be prohibited from participating in the City's contracting decisions.

FACTS

You serve on the City Council of the City of King (the "City"), having been elected to that position in 2012. Also, for 20 years or more, you have been a 50-percent shareholder and officer of King City Glass, a California corporation. The other 50-percent of the shares are owned by your husband. Your husband serves as President and Secretary, and you are Vice President and Treasurer of the corporation. King City Glass is a commercial enterprise that engages in three different types of business for purposes of this inquiry: (1) Retail operation; (2) Glass repair and installation; and (3) Building projects.

Retail Operation. King City Glass has a standard retail operation located in the City in which customers come into the shop, select the product they want to buy, and pay for the product. Other than the exchange of payment for product, there are no negotiations to the transaction. The City has made such purchases from King City Glass over the years. Retail purchase decisions are made by City staff without consultation with or direction from the City Council, neither individually nor collectively.

Repair and Installation. The second area of business activity for King City Glass is making glass and related repairs and installations for vehicles and for residential and commercial buildings. For this service, a customer typically calls King City Glass to have a service person come to their home or business and make the necessary repair. Once the repair and installation is complete, the customer is given an invoice and payment is received. There is no bidding process for this work. When requested by the City, the request is from City staff with no input from the City Council members either individually or collectively.

You indicate that the provision of these services to the City ceased upon your being sworn into office on the city council and will not resume pending our response to this request for advice.

You have included with your request a history of both retail and glass repair and installation transactions between King City Glass and the City since 2004. By your calculations, the City has averaged approximately \$1,644 in annual payments to King City Glass for these types of goods and services provided during this period. It appears that several of these transactions involved the repair and/or installation of glass on City vehicles, while most of the others involved repairs and/or installations involving other City property.

King City Glass is a unique retail and service outlet in King City. There are some commercial enterprises from outside King City that regularly provide service calls for automotive window repair, but none with a brick and mortar location in King City and no other businesses in King City supply the same unique retail products in this line of business. The City has a need for local glass and related repair and installation services since, on a number of occasions, windows or doors to City facilities have been vandalized, needing emergency repair. The nearest other location that can provide that type of service is 45 miles away.

Building Projects. King City Glass has, in the past, been a successful bidder on building projects subject to the jurisdiction of the City Council. You indicate that King City Glass will not bid on these types of projects the City puts out to bid while you serve on the City Council and own an interest in King City Glass.

ANALYSIS

Conflicts of Interest under the Act

The Act prohibits public officials from making, participating in making or using their official positions to influence government decisions in which they have a financial interest. (Section 87100.) Thus, as a general rule, because of your one-half ownership of King City Glass, the Act would prohibit you from participating in your official capacity as a city councilmember in any City decisions to contract with that company. (Also see Section 87103.) Section 1090, which is a conflict of interest rule separate from the Act, is more restrictive than the Act. Therefore, our analysis will focus on the application of Section 1090.

However, please note that if a matter concerning King City Glass comes before the city council and you are required to disqualify yourself due to a conflict of interest under the Act, Section 87105 and Regulation 18702.5 set forth specific procedures you must follow to properly complete the disqualification. If you need additional information on these procedures, please contact us.

Conflicts of Interest under Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their

agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Typically, we employ the following six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090:

Step One: Is the official subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members.” Councilmembers of the City are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) There is no question that any proposed agreement by which King City Glass would provide goods or services to the City would be a contract for purposes of Section 1090. (*People v. Honig, supra*, at p. 351.)

Step Three: Is the official making or participating in making a contract?

Section 1090 applies to officials who participate in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft, supra* at p. 569.) Notably, in relation to a public body such as a city council, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

In this regard, you mention that past contracts that have typically been made between the City and King City Glass have been made only through the City staff without involvement of the city council. However, this arrangement is not sufficient to avoid a violation of Section 1090. As stated by the Attorney General in 87 Ops.Cal.Atty.Gen. 9 (2004) and 88 Ops.Cal.Atty.Gen. 122 (2005), a body such as a city council cannot avoid application of Section 1090 by delegating its contracting authority to another individual or body. We agree with the reasoning of this opinion. Thus, since the city council has the ultimate authority to approve City contracts, the fact that the decision on whether to contract with King City Glass is delegated to City staff does not remove the application of Section 1090 to you and the city council.

Step Four: Does the official have a financial interest in the contract?

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest” (*People v. Honig, supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson, supra*, at pp. 645, 651-652; *see also People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Since you own a one-half interest in King City Glass and also presumably receive income from that company, you are clearly financially interested in contracts made with the company.

Therefore, because you are financially interested in contracts between the City and King City Glass, unless an exception applies, the City cannot make any contracts with the company.

Step Five: Does either a remote interest or non-interest exception apply?

When Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) The Legislature has, however, created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5.

If a “remote interest” applies, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity’s official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a “noninterest” is present, the contract may be made

without the officer's abstention, and generally, a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

Under your facts, none of the "remote" or "noninterest" exceptions set forth in Sections 1091 and 1091.5 apply.

Step Six: Does the Rule of Necessity Apply?

In limited circumstances, a "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government agency may acquire an essential service, despite the existence of a conflict, when no source other than that which triggers the conflict is available; the rule "ensures that essential government functions are performed even where a conflict of interest exists." (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.)

The rule of necessity has only been applied in limited situations. For example, the Attorney General applied the exception to allow a city to obtain emergency nighttime services from a service station owned by a member of the city council where the town was isolated and the council member's station was the only one in the area that was open. (4 Ops.Cal.Atty.Gen. 264 (1944).) Similarly, the Attorney General applied the exception to a healthcare district in a remote area when contracting to advertise its services on a local radio station, even though one of the district's directors was employed at the station. After exploring other outlets, it was clear that the radio station was the only source that would deliver the necessary information in an efficient, cost-effective, and timely manner. (88 Ops.Cal.Atty.Gen. 106 (2005).) What these situations have in common is the exigency of the circumstances such that delaying action to contract with a non-conflicted source would be to the detriment of the public.

We think a similar rationale could apply in certain limited circumstances were the City to contract for goods or services with King City Glass. Specifically, your facts state that sometimes it is necessary for the City to immediately repair broken or damaged glass on its buildings or other facilities to prevent vandalism or theft. King City Glass can provide this service and you indicate that the nearest alternative provider of such services is located 45 miles away. Thus, we think the rule of necessity would apply to permit the City to contract with King City Glass when the contract is for repairs reasonably related to the replacement of glass on city buildings or facilities and it is necessary for the City to immediately act to prevent vandalism or theft. However, we would not extend this exception to other City needs such as the repair of glass on city vehicles, the purchase of items not immediately necessary to prevent a significant detriment to the public, or for the general construction of or repairs to City buildings or facilities. The facts indicate that there are other companies in the City that provide glass repair and replacement on vehicles. Also, the purchase of other items, or the general construction of or repairs to City buildings or facilities would not, absent emergency circumstances, require the City to immediately contract the services of King City Glass.

When the “rule of necessity” applies, as here, to an official on a multi-member board or body, the Attorney General has concluded that the interested official must abstain from any participation in the decision. In other words, the rule permits the body to make the contract so long as the financially interested official does not participate in the body’s decision. (See 89 Ops.Cal.Atty.Gen. 217 (2006); 88 Ops.Cal.Atty.Gen. 106, 112 (2005).) This conclusion would be consistent with our determination above that the Act’s own conflict of interest rules would prohibit your participation in any otherwise permissible City decision to contract with King City Glass. Accordingly, in the limited circumstances outlined in the paragraph immediately above, the City may contract with King City Glass, but you would be required to abstain from any participation in the City’s contracting decision.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Scott Hallabrin
Senior Counsel, Legal Division

SH:jgl